HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case

W.P. No. 142/2003 (SS)

Dayal Singh Bisht Vs. State of Uttaranchal and others.

Approved for reporting

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~~Not approved for reporting~~

Date of decision

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Reserved

Writ Petition no. 142 (SS) 2003

Sri Dayal Singh Bisht S/o Mohan Singh,
R/o Shivpur, DaakPathar, Dehradun. ….Petitioner.

Vs.

State of Uttaranchal through the Secretary,
Irrigation Department Uttaranchal, Dehradun,
And four others. ….Respondents

Sri C.K. Sharma, counsel for the petitioner.
Sri B.D. Kandpal Counsel for the respondents.

Dated: March 3,2004:

Hon'ble Rajesh Tandon J.

Heard Sri C.K. Sharma, learned counsel for the petitioner and Sri B.D. Kandpal, learned Standing Counsel for the State.

By the present writ petition, the petitioner has prayed for the issue of a writ, order or direction in the nature of certiorari quashing the impugned order dated 19.04.2002 with regard to recovery of the excess amount paid to the petitioner and to pay the gratuity to the petitioner after duly computing from 19.01.2000. Further with a prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to compute the gratuity till 19.01.2000 and made payment accordingly.

Brief facts giving rise to the present writ petition are that the petitioner was engaged with the respondents in the year 1965 on the post of Electrician on the work charge basis till 1901.2000 thereafter the petitioner retired from his services.

Counsel for the petitioner has submitted that he has made several representations for regularization but no orders were passed and as such he remained only a work charge employee, which has resulted in the payment of lesser salary and emoluments to him than his juniors.

The petitioner has further submitted that circulars dated 26.05.1969 of the then Chief Engineer, Irrigation Department, U.P. and circular dated 26.12.1980 of the Engineer in Chief were completely ignored.

Counsel for the petitioner has submitted that in view of the judgment passed by the Supreme Court in Desh Ram v. State of Punjab, reported in AIR 1988 SC 1982, the establishment of the respondent is an industry and the petitioner is a workman within the definition of Industrial Dispute Act 1947 as well as U.P. Industrial Dispute Act. Therefore, the petitioner was entitled for regularization.

Counsel for the petitioner has submitted that there were no standing orders regarding prescribed age of retirement of the workman employed as the work charge employee in the establishment. The C.C.A. rules and the provisions of the Financial Hand Book are also not applicable to the case of the petitioner. The tentative draft service rules of the work charge, sent by the department to the Govt. do not provide mandatory directions to the authorities to retire the work-charge employees after attaining the age of superannuation. Besides it the State of U.P. has issued an order dated 1.7.1989 regarding grant of pension to the temporary Govt. Servants on attaining the age of superannuation.

Petitioner has stated that vide order dated 27-10-1994, the petitioner was ordered to be relieved. He has challenged the order before the High Court of Allahabad (Lucknow Bench) in C.M. Writ Petition no. 5793(S/S) 1994 and the Allahabad High Court has passed the order to the following effect:-

“Connect with writ petition no. 1019 of 1991 (s/s) and other similar matters on the question of age of superannuation of work charge employee.

Learned standing counsel accepts notice and is granted six weeks’ time to file counter affidavit the petitioner may thereafter file a rejoinder affidavit within two weeks. List thereafter.

Meanwhile it is provided that the petitioner shall also be entitled to the benefit of the interim orders passed in the above noted writ petition. He shall be permitted to work if he is found physically and mentally fit shall not be treated superannuated as per annexure-1.”

Learned counsel for the petitioner has submitted that the writ petition was disposed of by the Allahabad High Court on 25.11.1999.

In other writ petition no. 5793/94 S/S of the similar nature fallowing order was passed by the Lucknow Bench of Allahabad High Court:-

"Is matter has come in the supplementary cause list on the request of learned State counsel none appears on behalf of petitioners. Learned State counsel Sri Alik Sinha has brought to the basis of this court a division bench Lucknow judgment passed by this court in writ petition no. 9123/98 S/S and connected matters and stated that the controversy involved in the present writ petition is already been decided by this court in the said judgment. Those writ petitions related to the judgment of work charge employees who claimed that they could not be retired at the age of 58 years and there were some petitioners in which pensionary benefits had also been claimed beside regard. Inaction in service and those points were considered and decided in the aforesaid judgment by the division bench.

These writ petitioners are, therefore, disposed of finally in accordance with the judgment rendered by this court in writ petition no. 9123/99 S/S decided on 30.08.00. The petitioners of these writ petitions shall also be entitled to the benefit of order passed in writ petition on 9123/99 (s/s) dt. 30.08.99."

The petitioner has submitted that the similar situated persons who also have got the interim orders and who retired in the year 1997 about 4 years before the petitioners, have been sanctioned gratuity amounting to Rs. 59.139/- by the department, therefore computing the gratuity of the petitioner only from 1994 (the length of service period on which the petitioner has served with the department in pursuance of the interim order passed by this Court) is wholly illegal as the similar situated persons have been paid the gratuity till there last year of working.

Counsel for the petitioner has submitted that the Irrigation Department has imposed the ceiling limit of dearness allowances on

the pay scale of the petitioner relating to the portion of payment of bonus and has imposed artificial ceiling on the pay scale of the petitioner but while disposing of the writ petition no. 3234(S/S) 1997 filed by the petitioner along with co-petitioners the Allahabad High Court on 27.08.1999 has observed as follows:-

"…….after issuance of these earlier ceiling put on the dearness allowances by the State Government no more service and now the petitioner shall be paid the revised consolidated pay scale w.e.f. 1.1.96."

Therefore, according to the petitioner the respondents cannot deduct the dearness allowance paid in pursuance to the interim order dated 21.05.1997.

On the other hand, a counter affidavit has been filed by the respondent in which it has been stated that the petitioner was engaged in the department in the year 1965 and he attained at age of superannuation on 30.11.1994. The respondents have further stated, interalia that the petitioner after getting the interim order from the Allahabad High Court continued to work till 29.01.2000; that the work charge employees were regularised according to seniority list as per the number of the post falling vacant in the regular establishment; that the petitioner was provided all the facilities and emoluments due in the establishment in which he was working; that the standing orders of the Engineer-in-Chief, Irrigation Department were in force and all the work-charge employee retired under the standing orders; that the G.O. dated 1.7.1989 pertains to the Govt. servants on regular establishment, who have completed 10 years of service but have not been made permanent, therefore this order does not pertain to the work-charge employees; that the case of the petitioner is governed by the order no. 7754/3/84-23-Si-7/88/1/82 dated 10.9.1986 passed by the Chief Engineer, Irrigation Department, U.P. which provides that the work-charge employees will not get pension after their retirement, but would be entitled to gratuity. Paragraphs 4 and 7 of the counter affidavit is reproduced as under:-

4. That the contents of para 2 of the writ petition are not admitted as stated. The petitioner was engaged as Electrician in work-charge establishment in the year 1969 and not in the year 1965.

He attained the age of superannuation on 30.11.1994 but he secured an interim stay from the Hon'ble Allahabad High Court, Lucknow Bench (Annexure-2 to the writ petition) and continued to work till 29.01 2000 i.e. after the date of the final order of the Allahabad High Court. Based on the judgment the retirement of the petition become effective from the original date of retirement i.e. 30.11.1994. A copy of the letter dated 29.1.2000 from which the petitioner was retired is being filed herewith and marked as Annexure no. C.A.-1 to this affidavit.

7. That the contents of para 5 of the writ petition are not admitted. The petitioner was not ousted from his service in violation of statutory provisions. The petitioner attained his age of 58 years in November 1994. It is also submitted that the establishment in question is not an Industry. All the benefits available under Rules have already been given to him."

Sri C.K. Sharma, learned counsel for the petitioner in the alternative contended that the pay of the petitioner may be calculated for the purposes of gratuity till the age of 60 years i.e. upto 30.11.1996.

Counsel for the petitioner has referred the Government order dated 5th February 2001 regarding payment of gratuity and has given the details regarding the calculation of gratuity. It reads as under:-

" That the act of the respondents in computing the gratuity from only upto the year 1994 is wholly illegal and bad in the eye of law, because in accordance with apparent of the gratuity Act 1972, the method of computing the gratuity is as below:

"Last wages drown X length of service period X 15/26= gratuity" A copy of the government order dated 5.2.2001 is being filed herewith and marked as Annexure No. 6 to this writ petition.

Counsel for the petitioner has referred the Judgment of Gorakhpur University and others Vs. Dr. Shila Prasad Nagendra and others SIR 2001 SC 2433 regarding retirement benefits are as under:-

"We have carefully considered the submissions on behalf of the respective parties before us. The earlier decision pertaining to this

very University reported in 1995 (2) ESC 211 (ALL) (supra) is that of a Division Bench rendered after considering the principles laid down and also placing reliance upon the decisions of this Court reported in (1994) 6SCC 589 (supra) which, in turn, relied upon earlier decisions in state of Kerala Vs M. Padmanabhan Nair (1985) 1SCC 429: (AIR 1985 SC 356: 1985 Lab IC 664) and AIR 1981 SC 212(supra). This Court has been repeatedly emphasizing the position that pension and gratuity are no longer matter of any bounty to be distributed by Government but are valuable rights acquired and property in their hands and any delay in settlement and disbursement whereof should be viewed seriously and dealt with severely by imposing penalty in the form of payment of interest. Withholding of quarters allotted, while in service, even after retirement without vacating the same has been viewed to be not a valid ground to withhold the disbursement of the terminal benefits."

In 1995 Supplementary (1) SCC 18 Sahib Ram Vs. State of Haryana and others the Hon'ble Apex Court has held as under:-

"Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not be applies to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs."

In 1994 (2) SCC 521 Shyam Babu Kverma and others Vs. Union of India and others the Hon'ble Apex Court has held as under:-

"Although we have held that the petitioners were entitled only to the pay scale of Rs.330-480 in terms of the commendations of the

Third Pay Commission w.e.f. January 1, 1973, and only after the period of 10 years, they became entitled to the pay scale of Rs. 330-560 but as they have received the scale of Rs. 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps would be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondent, the petitioners being in no way responsible for the same."

In Ram Khelawan Pathak Vs. State of U.P. and others reported in 1983(2) UPLBEC 1954 wherein it has been held that when employee has worked beyond the period of this retirement the residuary period should be treated as fortuitous. His lordship has relied upon the judgment of Apex Court in S.V. Bhima Bhatta and another Vs. State of Karnataka and others reported in JT 1996 (2) SC 236. The observations in the judgment of Ram Khelawan Pathak(supra) is quoted below:-

" In a case where an employee has worked beyond the period of his retirement the residue period should be treated as fortuitous as has been held by Hon'ble Supreme Court in judgment Today 1996(2) SC 236, S.C. Bhima Bhatta and another Vs. State of Karnataka and other. The matter also came to be considered in another case reported in judgment Today 1997(1) SC 353, Mahmood Hasan and others Vs. State of U.P. and others, where the employees were reverted to a lower post as their promotion was against rule, it was held that those who will have to step down on a count of correctional process need not refund the pecuniary or other benefits enjoyed by them for they had actually worked during that period. There is yet another direct authority on the point reported in 1994 (20 SCC, 621, Shyam Babu Varma and others Vs. Union of India and others. Din which the Apex court dealing with the similar situation, ruled that since the petitioner received higher pay scale not due to fault or his own, it shall not be just and proper to recover the salary already paid to him. A Division Bench of this Court had the occasion to deal with the similar controversy in 1996 (3) UPLBEC 1840, Harish Chandra Srivastava

Vs. State of U.P. and others. In that case also, an order was passed without giving an opportunity to withhold superannuation benefits to the petitioner, who was wrongly, promoted and was paid the higher salary. It was observed that the impugned order was liable to be quashed not only on the ground of want of affording reasonable opportunity of being heard to the petitioner but also on the ground that the petitioner cannot be held responsible for securing promotion on the higher scale of pay by misrepresenting the department and therefore, the payment of salary cannot be recovered."

Relying upon the decisions of Apex Court in Deokinandan Prasad Vs. State of Bihar, AIR 1971 SC 1407, Madan Mohan Pathak Vs. Union of India AIR 1978 SC 1407, State of U.P. Vs. Shardul Singh 1970(1) SCC 108 Poonamal Vs. Union of India AIR 1985 SC 1196, D.S. Nakara Vs. Union of India AIR 1983 SC 138, Salabuddin Mohd. Yunus Vs. State of AP AIR 1984 SC 1985, State of U.P. Vs. Brahm Datt Sharma AIR 1987 SC 943 it has been held in Sushila Bhatnagar Vs. State of U.P. 1998 UPLBEC 2214 the retirement benefits are not a bounty payable on the sweet will and pleasure of the Govt. and it is a right of the person to receive it under Article 31(1) of the Constitution of India as well as it is a property under Article 19(1) (f) of the Constitution of India. The observations are quoted below:-

"Retirement benefits is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a Government servant. The right of the person to receive pension is property under Article 31(1) and by a mere executive order the state had no power to withhold the same. Similarly the said claim is also property under Article 19(1)(f) and it is not saved by sub article (5) of Article 19. Therefore, denial of right to receive person affects the fundamental rights of the person under Article 19(1) (f) and 31(1) of the Constitution. It was so held in case of Deokinandan Prasad Vs. State of Bihar, AIR 1971 SC 1407. In the case of Madan Mohan Pathak Vs Union of India, AIR 1978 SC 803, the apex Court had held that property in Article 19,31(1) and 31(2) must have the same cannotation and since these are constitutional provisions intended to

secure a fundamental right they must receive the widest interpretation and must be held to refer to property of every kind. Property within the meaning of Article 19(1) (f) and 31(2) comprises every form of property, tangible or intangible, including debts and chooses in action such as unpaid accumulation of wages, pension and cash grants. Grant of payment of retirement benefits are part of the conditions of service which has been so interpreted in the case of State of M.P. Vs. Shardul Singh, 1970(1) SCC 108. That the expression conditions of service is an expression if wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension etc. in the case of Poonamal Vs. Union of India, AIR 1985 SC 1196, it was observed by the Apex Court that pension is not merely a statutory right. It is the fulfillment of the constitutional promise in as much as it partakes the character of public assistance in case of unemployment, old age, disablement or similar other cases of undeserved want. Relevant Rules merely make effective the constitutional mandate. Pension is a right not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and any one entitled to the pension under the rules can claim it as a matter of right. In the case of D.S. Nakara Vs. Union of India, AIR 1983 SC 130: 1983 UPLBEC 378(SC), the Apex Court had laid down that pension is neither a bounty not a matter of grace depending upon the sweet-will of the employer, nor an ex-gratia payment. It is a payment for the past service rendered. It is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. Pension as a retirement benefit is in consonance with a furtherance of the goals of the Constitution. The most practical raison denter for pension is the inability to provide for oneself due to old age. It creates a vested right and is governed by the statutory rules. In the case of Salabuddin Mohd Yunus Vs. State of A.P. AIR 1984 SC 1905, it was held that right to receive pension is a fundamental right, which can be curtailed only in the manner

provide in the Constitution . It was further held that pension is property within the meaning of Article 31(1) of the Constitution and that it is also a right under Article 19(1)(f) which could not be restricted even as provided under clause (5) of Article 19 and that clause has no application to the right to receive pension. Pension is not a bounty but a right earned by a Government servant on the basis of length of service, is also so recognized. In the case of State of U.P. Vs. Bram Dutt Sharma, AIR 1987 SC 943."

The petitioner was working uptill the year of 2000 on the basis of the interim order dated 19th May 2003 granted by this Court to the following effect:-

"…..In the meantime realization of amount from petitioner as mentioned in annexure-1 shall remain stayed."

However, no right has accrued to the petitioner to obtain the retirement benefits beyond the period of 60 years. So far as excess payment is concerned, no doubt, the petitioner has worked after the date of superannuation continuously and he cannot be at fault as no such notice was given to him for retirement and he was allowed to work regularly.

The writ petition is accordingly allowed. The respondents are directed to release the gratuity and other retirement benefits in favour of the petitioner treating his superannuation age as 60 years, within one month after the receipt of the certified copy of this order. No order as to costs.

(Rajesh Tandon, J.)

March 3, 2004:
NCM: